INDEX.

	PAGE
Introduction	1
Argument	6
I. The affidavit of bias and prejudice does not comply with Section 21 of the Judicial Code	6
A. The affidavit was filed too late	6
B. The facts alleged in the affidavit in connection with other facts of record herein fail to show that Judge Chatfield was biased	10
II. Section 21 does not apply to the bankruptcy proceedings herein	13
III. Mandamus is the proper and only remedy open to petitioners	14
A. Mandamus is the only remedy.	14
B. Mandamus is the proper remedy under the circumstances of this case	19
1. Petitioners are not attempting to control judicial discretion by mandamus	19
2. Petitioners are not guilty of laches	28
3. Under the facts of record, mandamus will be an effective remedy	28

POOR COPY

INDEX OF CASES CITED.

	PAGE
Abraham *v.* Ordway, 158 U. S. 416	24
Bales *v.* Ferrell, 20 Ky. Law Rep. 1564	7
Burke *v.* Smith, 16 Wall. 390	24
Chapman *v.* County of Douglas, 107 U. S. 348.	24
Crook *v.* Newburg, 124 Ala. 279; 27 So. 432	22
Dolan *v.* Church, 1 Wyo. 187	8
Duffy *v.* Hickey, 68 Wis. 380	7
Duke *v.* Turner, 204 U. S. 623	27
Dupoyster *v.* Ft. Jefferson Imp'v't Co.'s Receiver, 121 Ky. 518	7
Foster *v.* Mansfield, etc., R. R. Co. 146 U. S. 88	24
Galliher *v.* Caldwell, 145 U. S. 368	24
German Ins. Co. *v.* Landram, 88 Ky. 433	7
Gildersleeve *v.* New Mexico Mining Co., 161 U. S. 573	24
Halstead *v.* Grinnan, 152 U. S. 412	24
Harding, *Ex parte*, 219 U. S. 363	20
Henry *v.* Speer, 201 Fed. Rep. 869	9
Iron Clad Mfg. Co., *In re.*, 194 Fed. Rep. 906.	10
Ives, *In re*, 113 Fed. Rep. 911	9
Johnson *v.* Standard Mining Co., 148 U. S. 360	24
Lansdale *v.* Smith, 106 U. S. 391	24
Lemmon & Gale Co., *In re*, 112 Fed. Rep. 296	9
McClellan *v.* Carland, 217 U. S. 268	17
Matter of Eastern Cherokees, 220 U. S. 83	28
Moorehouse *v.* Pacific Warehouse & Steel Co., 177 Fed. Rep. 337	15

	PAGE
O'Brien *v.* Wheelock, 184 U. S. 450	24
P. C. C. & St. L. Ry. Co. *v.* Austin, 141 Ky. 722	7
Rosenbaum *v.* Bauer, 120 U. S. 450	17
Sandusky *v.* National Bank, 23 Wall. 289	8
Sena *v.* United States, 189 U. S. 233	24
State *v.* Dick, 103 Wis. 407; 79 N. W. 421	21
State *v.* Pitts, 139 Ala. 152; 36 So. 20	22
State Bar Assn., *Ex Parte*, 92 Ala. 113; 8 So. 768	20
State *Ex Rel. v.* Clifford, 65 Wash. 313; 118 Pac. 40	7
Swineford *v.* Pomeroy, 16 Wis. 553	7
United States *v.* Moore, 12 How. 209	24
United States *Ex Rel.* Herless *v.* Judges of the U. S. Court of Appeals of Indian Territory, 85 Fed. Rep. 177	17
Wetzel *v.* Minnesota Ry. Co., 169 U. S. 237	23

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

Ex parte—AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN, Petitioners.

Supplemental Brief in Support of Petition for Writ of Mandamus.

These pages are intended to supplement the argument of the brief heretofore filed on the following propositions:

I.

That the affidavit of bias and prejudice does not comply with Section 21 of the Judicial Code.

II.

That Section 21 does not apply to the bankruptcy proceedings herein; and

III.

That mandamus is the proper and only remedy open to petitioners.

However, before entering upon the argument in support of these propositions, it is necessary to summarize the returns of the respondents and the traverse of the petitioners thereto. It should be noted that no material fact of the petition is

POOR COPY

traversed in the returns, which must, therefore, be considered as in the nature of pleas in confession and avoidance.

The return of Judge Chatfield recites: that he has hitherto failed to enter an order on his opinion of March 15, 1912 (194 Fed. Rep., 906), because of the order of Judge Lacombe, dated April 2, 1912 (Petition, 41-42), and the restraining order of Judge Mayer, dated April 22, 1912 (Petition, 43-45), and in order "to avoid complicating the proceedings before Judge Mayer," in view of the latter's statements in his opinion of April 15, 1912 (Return of Judge Mayer, Ex. A, 17-18); that since March 29, 1912, he has treated all matters relating to the bankruptcy proceedings as before Judge Mayer under the order of Judge Lacombe, dated April 2, 1912, and his own order of May 22, 1912, under Section 97 of the Judicial Code; and that "he could and would controvert and deny the various matters" charged in the affidavit of bias.

The return of Judge Lacombe states: that the order of April 2, 1912, transferring the proceedings to Judge Mayer, was made by him "in the exercise of his judicial discretion, and under the authority conferred by Section 21 of the Judicial Code," Judge Veeder of the Eastern District of New York having theretofore requested "to be relieved from acting further in such bankruptcy proceedings;" that during the course of the proceedings before Judge Mayer the Barrel Company and Mrs. Seaman were adjudged to be in contempt for failure to produce certain books and records of the Barrel Company as required by the order of that Judge, which judgment of contempt was revised by the Circuit Court of Appeals, resulting in a reversal as to Mrs. Seaman and in an affirmance as to the Barrel Company; and that no steps were taken by petitioners to secure a revision of the order of April 2, 1912, by the Circuit Court of Appeals.

POOR COPY

The return of Judge Mayer alleges: that he is exercising jurisdiction over the bankruptcy proceedings pursuant to the order of Judge Lacombe, dated April 2, 1912; that on April 12, 1912, he announced his opinion in favor of the motion of the creditors for the reference to a master of the question of the *bona fides* of the Barrel Company's ownership of its property and assets, and on April 22, 1912, entered an order thereon, since which last date the special master has proceeded with the hearings, under that order, on at least fifty days, beginning April 29, 1912, and ending March 7, 1913, during which time "upwards of 2,072 pages of testimony have been taken;" that the hearings were delayed by the failure of the Barrel Company and Mrs. Seaman to produce certain books and records, for which failure the former was fined $2,500 and the latter $3,000, together with a jail sentence of 20 days, a stay being granted to make possible a review in the Circuit Court of Appeals; that since April 2, 1912, petitioners have appeared before him by counsel, argued motions and sought rules to show cause; that the claims against the bankrupt amount to about $600,000, while the assets in the hands of the trustee amount to only $10,000, and that Mrs. Seaman owns all of the stock of the bankrupt company, of which she is president and treasurer, and claimed, until shortly before the bankruptcy proceedings to own all of the stock of the Barrel Company, of which she is likewise president and treasurer; that petitioners had acquiesced in all of his orders up to January 29, 1913, except where they sought a review in the Circuit Court of Appeals, and had made no objection to the conduct of the proceedings prior to that date; that at the time of the granting of the rule herein, a number of motions relating to the administration of the bankrupt estate were pending, five matters being specified, three of which relate to allowances of counsel

fees, one to the renewed punishment of Mrs. Seaman for contempt, and one to the payment by the Barrel Company of the fine imposed for its contempt of Court; that since he has presided over the bankruptcy proceedings no one other than Mrs. Seaman has appeared before him claiming any interest in the Iron Clad Company or in the Barrel Company, though one George A. Wheelock, claiming to own the capital stock of the Barrel Company, has been represented in the proceedings by counsel, whose request to withdraw his appearance, made at the instance apparently of Mrs. Seaman, was denied; and that the entire proceeding has been a contest between the trustee in bankruptcy and Mrs. Seaman.

The traverse of the petitioners to the returns of respondents sets out: (*a*) *as to the return of Judge Chatfield*, that said Judge refused to continue jurisdiction over the bankruptcy proceedings solely because of the filing of the affidavit of bias; that Judge Mayer's restraining order of April 22, 1912 (Petition, 43-44) has deprived petitioners of the benefit of Judge Chatfield's decision of March 15, 1912 (194 Fed. Rep., 906); and that the order of May 22, 1912, entered in the minutes of the District Court for the Eastern District of New York, in attempted compliance with section 97 of the Judicial Code, purporting to authorize Judge Mayer to act as judge of the eastern district for all purposes and at all times, can have no reference to the bankruptcy proceedings herein, which were transferred to Judge Mayor long prior thereto, and is void; (*b*) *as to the return of Judge Lacombe*, that petitioners objected to the jurisdiction of Judge Mayer to hear the bankruptcy proceedings, under the designation of April 2, 1912, continuously from the very outset of those proceedings before that Judge; that the creditors made no attempt by appeal or otherwise to secure a review of the opinion

POOR COPY

of Judge Chatfield of March 15, 1912 (194 Fed. Rep., 906); that the books and records for the failure to produce which petitioners were adjudged to be in contempt of court, were not in petitioners' possession at the time of the orders requiring their production, but were produced in court by petitioners immediately after they were surreptitiously placed, by unknown persons, in the vestibule of Mrs. Seaman's residence; and that an examination of those books by expert accountants disclosed the fact that the Barrel Company is creditor of the bankrupt to the extent of about $400,000; (*c*) *as to the return of Judge Mayer,* that petitioners have not at any time acquiesced in the designation of Judge Mayer under the order of April 2, 1912, but, on the contrary, have reserved objections to that order at every stage of the proceedings; that because of the rapidity and assiduity with which the proceedings have been carried on before the special master by numerous counsel for the creditors and under restraining orders directed against petitioners, it was physically impossible to make application to this Court for the writ of mandamus sooner than was done; that the remark of Mrs. Seaman quoted at page 24 of Judge Mayer's return was not made of the books, for the non-production of which she was adjudged in contempt, but of certain other books which were produced in court immediately after the remark was made; that the books concerned in the contempt proceedings were removed and detained by unknown persons and returned and produced in court as stated in the traverse of Judge Lacombe's return; that the Barrel Company, Mrs. Seaman, and her mother are large creditors of the Iron Clad Company; that the receiver and trustee in bankruptcy have received assets valued at about $42,000.00, and that there is still in the trustee's possession property valued at more than $63,000.00; and that the bank-

ruptcy proceedings herein are not a controversy between the trustee of the bankrupt and Mrs. Seaman as the owner of the capital stock of the bankrupt corporation and the Barrel Company, and as an officer of those companies, but that all the stock of the Barrel Company except one share is and has been since April 11, 1911, owned by George A. Wheelock, whose non-appearance before Judge Mayer is accounted for by the fact that he is now and has been sojourning in France. The traverse concludes with a statement showing the impossibility of applying to this court for the writ of mandamus sooner than was done.

I.

The affidavit of bias and prejudice does not comply with Section 21 of the Judicial Code.

A.

The affidavit was filed too late.

Section 21 of the Judicial Code, under which the transfer herein is sought to be sustained, is admittedly new so far as federal legislation is concerned. Its clear language requiring the affidavit to be filed "not less than ten days before the beginning of the term of the court" manifests an intention not to sanction the disqualification of a judge at the stage of a case that the bankruptcy proceeding herein had reached when the affidavit was filed. This construction of the section is fortified further by the decisions of courts of the several states, which, either at common law or by statute, permit the disqualification of a judge for bias, prejudice or interest, or a change of the venue of a suit or pro-

POOR COPY

ceeding. These decisions uniformly require that the objection to the judge or the motion for change of venue must be made at the very outset of the case. See 4 Encyc. Pl. and Pr., 426-428, and cases there cited. It is believed that no case can be found in which a change of judge or venue was allowed after the presiding judge had written his opinion in the case, and only the formal entry of an order thereon remained to be made.

The common law rule is stated as follows in the case of *P. C. C. & St. L. Ry. Co.* v. *Austin,* 141 Ky., 722, 725:

> "It is a fundamental rule of the common law that an objection to the judge must be made at the threshold, and if not so made is waived."

In those states where a statute similar to Section 21 is in force, the courts hold that the affidavit of bias must be filed at the outset of a case or proceeding, even though the statute itself is silent as to the time of the filing of the affidavit.

KENTUCKY:

> Gen. Stats., ch. 28, Art. 7, Sec. 1; applied in *German Ins. Co.* v. *Landram,* 88 Ky., 433, 440; *Dupoyster* v. *Ft. Jefferson Imp'v't Co.'s, Receiver,* 121 Ky., 518, 521; *Bales* v. *Farrell,* 20 Ky., Law Rep., 1564, 1565.

WASHINGTON:

> Laws 1911, ch. 121, Sec. 1-2; applied in *State ex rel.* v. *Clifford,* 65 Wash., 313; 118 Pac., 40, 41-42.

WISCONSIN:

> Rev. Stat., ch. 123, Sec. 8; applied in *Swineford* v. *Pomeroy,* 16 Wis., 553; *Duffy* v. *Hickey,* 68 Wis., 380.

WYOMING:

> Laws of 1869, ch. 75, Sec. 59, pp. 517-518; applied in *Dolan* v. *Church,* 1 Wyo., 187, 189-190.

If, therefore, the language of Section 21 should be considered to be at all ambiguous, that section should be construed in conformity with the principle of the above cases as well as in accordance with the common law rule requiring objection to a judge to be made at the threshold of the case.

In the main brief it is argued that if Section 21 applies to the bankruptcy proceedings herein, and is constitutional, the affidavit of bias should have been filed not later than ten days before the first Wednesday in June, 1911, the beginning of the term of court in which the bankruptcy of the Iron Clad Company was first to be tried, and should not have been filed in any event, later than ten days before the beginning of the December, 1911, term of the District Court, at which term the hearing was had on the amended and supplemental petition for the extension of the receivership (Brief, pp. 6-15). It is now submitted that the only time the affidavit could have been filed conformably to the imperative language of Section 21, that "every such affidavit * * * shall be filed not less than ten days before the beginning of the term of court" was not less than ten days preceding the June, 1911, term of the District Court, during which the first hearings in the bankruptcy proceedings were had. This conclusion follows from the principle of law that because of the peculiar nature of bankruptcy proceedings there are no terms of District Courts as courts of bankruptcy.

In *Sandusky* v. *National Bank,* 23 Wall., 289, 292-293, the Court said:

> "A proceeding in bankruptcy from the time of its commencement, by a filing of a

POOR COPY

> petition to obtain the benefit of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings on any pending suit are, therefore, at all times open for re-examination upon application therefore in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

In the above case the court was speaking of the bankruptcy act of 1867. But this language of the court has been adopted as construing correctly the bankruptcy act of 1898, under which the bankruptcy proceedings herein were initiated. It was so adopted in *In Re Lemmon & Gale Company,* 112 Fed. Rep., 296, 300, in which case the opinion was handed down by Mr. Justice Day and concurred in by Mr. Justice Lurton and by Judge Severens; likewise in the case of *In Re Ives,* 113 Fed. Rep., 911, 913, in which Mr. Justice Day and Mr. Justice Lurton sat.

Petitioners submit, therefore, that if Section 21 applies to the bankruptcy proceedings herein, the affidavit should have been filed not later than ten days before the first Wednesday of June, 1911, the day of the beginning of the term of the district court as such, in which the bankruptcy of the Iron Clad Company was first to be tried in the bankruptcy division thereof. In point of fact, however, the affidavit was not filed until March 29, 1912, nine months too late, at which time the bankruptcy proceedings were well under way. This objection to the affidavit herein is not a technicality. The nature of Section 21 is such that a literal compliance with its terms should be required. In the case of *Henry* v. *Speer,* 201 Fed. Rep., 869, an affidavit was

held insufficient because it failed to state that the bias and prejudice of the judge was a personal one, as provided for by the statute. At page 872 the Court stated the rule of construction to be applied to Section 21, as follows:

> "Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions."

B.

The facts alleged in the affidavit in connection with other facts of record herein fail to show that Judge Chatfield was biased.

Examination of the affidavit of alleged bias and prejudice on which the removal was sought, discloses that every fact therein averred developed in the course of the bankruptcy proceedings *solely*. The last alleged fact of bias was the renewed refusal of Judge Chatfield to refer the extension proceedings to a Master for hearing on the facts. The opinion of Judge Chatfield, filed on March 15, 1912 (194 Fed. Rep., 906), refusing to so refer the matter, will be searched in vain to discover any evidence of alleged bias or prejudice whatsoever. In that opinion Judge Chatfield reviews the adjudicated cases pertinent to the inquiry; states the controlling rule thus judicially established; analyzes the facts then appearing before him upon the pleadings and proof, and thereon concludes:

> "Under these circumstances and bearing in mind that the American Steel Barrel Company now claims a large debt from the Iron Clad Manufacturing Company, and that in endeavoring to prove this claim it will be necessary for the American Steel Barrel Company to show the amount which it previously owed to the Iron Clad Manufacturing Company, or which had been in-

POOR COPY

vested in the American Steel Barrel Company by the Iron Clad Manufacturing Company, and that these amounts have been paid, it is impossible to conclude that a bona fide claim of title cannot exist on the part of the respondents to the property as to which these questions arise. The only basis for such a claim would be the joinder of all these property rights in Mrs. Seaman, at the time when the alleged fraudulent act by her are said to have occurred. But as the companies and she herself were then abundantly solvent, and no reason for fraud has been shown, her claim of title cannot be held to be merely colorable, and the demand by Mrs. Seaman and the American Steel Barrel Company, that the creditors should not obtain this property without suit, must be sustained.

"As to the stock held by Mrs. Seaman, the question is apparently even more simple. A very difficult matter of bookkeeping is shown, and a very difficult question of fact is presented as to whether Mrs. Seaman owed money to the Iron Clad Manufacturing Company, or whether the Iron Clad Manufacturing Company owed money to Mrs. Seaman. It depends upon the alleged criminal acts of many people. This cannot be determined upon this motion. Her claim to the capital stock, and that of Mr. Wheelock as her successor, or her claim to the proceeds thereof, is such that the creditors can ask no more than that she be temporarily restrained, and that now Mr. Wheelock be temporarily restrained, from disposing of his capital stock without notice or consent of this court under the circumstances. In the same way the American Steel Barrel Company should be restrained from disposing of its property as a whole, and the trustee should be given opportunity to substantiate his claims against that company, with the certainty that the assets will not be removed beyond the reach of the court; but further than that the court cannot go.

> "The objection to a summary proceeding to determine the claim of title of third parties in possession must be sustained."

It will thus be sharply noted that Judge Chatfield clearly pointed out that the creditors were entitled and could have an order temporarily restraining Mrs. Seaman and Mr. Wheelock, claiming as purchaser of the capital stock of the company, from disposing thereof "without notice to or consent of this court under the circumstances," and that the American Steel Barrel Company should be restrained from disposing of its property until the trustee should have opportunity to substantiate his claims against that company. It is hence plain that the property would be thus kept preserved while *title* thereto should be determined in a plenary suit where the issues could be tried out according to the law of the land. The petitioning creditors thus had abundant opportunity, with complete preservation of the *res* pending such judicial determination. Refusing to follow that remedy, they persisted in the effort to determine ownership of property by summary proceeding in bankruptcy, and charged personal bias and prejudice against Judge Chatfield for a course of conduct in every way harmonizing with the law as judicially determined; with the facts as impartially reviewed by him, and with the resulting ample opportunity to determine the question of ownership by a plenary suit in accordance with the law of the land. How can bias or personal prejudice be affirmed against Judge Chatfield upon such a record? Petitioners feel constrained to bring these facts to the attention of the court because they distinctly disclose the unbiased action of a judge seeking to accord to litigants before him that due protection of the law which is the prime essential in the exercise of all judicial power.

II.

Section 21 does not apply to the bankruptcy proceedings herein.

Furthermore, it is submitted that the cases cited demonstrate the inapplicability of Section 21 to bankruptcy proceedings in general. It is true that the language of the first sentence of Section 21, "any action or proceeding, civil or criminal," is sweeping in scope, but the specific provision requiring the affidavit of bias to be filed within a stated time with reference to *"the term of the court"* shows that Section 21 was intended to apply only to *term cases* and *term proceedings*. Because of the rule, established by the cases *supra*, that the district courts as courts of bankruptcy have no terms, but are always open, it follows that Section 21 can have no application to bankruptcy proceedings, which are not term proceedings.

Moreover, inasmuch as there are usually numerous parties to a bankruptcy proceeding, and inasmuch as Section 21 allows each party to file one affidavit of disqualification, if that section applies to such a proceeding, the parties might by filing affidavits *seriatim* effectively bring about a gross miscarriage of justice such as Congress did not contemplate in enacting Section 21.

It is submitted, therefore, in addition to the contention of the main brief, that Section 21 has no application to the bankruptcy proceedings herein because those proceedings were begun six months before that section went into operation, that Section 21 does not apply to bankruptcy proceedings in general, and is consequently not applicable to the proceedings herein, because of the two reasons above amplified.

III.

Mandamus is the proper and only remedy open to petitioners.

A.

Mandamus is the only remedy open to petitioners.

The fifth paragraph of Judge Lacombe's return recites that "no petition or application was filed in the United States Circuit Court of Appeals to revise the order of April 2, 1912," and seems to suggest therein that petitioners had other means of relief than mandamus. That order could have been so revised only if it is within the scope of Section 24-b of the bankruptcy act, which provides:

> "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

This section in unmistakable language provides for the revision only of the proceedings of the bankruptcy court itself. The order of April 2, 1912, was not a proceeding of an inferior court of bankruptcy within the meaning of the above section for the obvious reason that it was not an order of the Judge of the court of bankruptcy, Judge Chatfield, but of the senior circuit Judge of the circuit, Judge Lacombe. While that order was entered in the course of the bankruptcy proceedings and affected them, it did not relate directly to the administration of the assets of the bankrupt, was entered by a Judge who, previous thereto, had had nothing to do with the bankruptcy matter in the trial court, and is therefore not within the letter of Section 24-b.

POOR COPY

But conceding the order of April 2, 1912 to be, what it plainly is not, a part of the proceedings of the bankruptcy court itself, it is submitted that that order is none the less not revisable under Section 24-b, *supra*. Not all orders of a bankruptcy court may be reviewed under that section, but only such as arise under the bankruptcy act, are peculiarly of a bankruptcy character, and directly affect the administration of the assets of the bankrupt. 1 Fed. Stats. Ann. 595 ff.; 1 Fed. Stats. Ann (1912 Supp.) 614 ff. The distinction between orders revisable under Section 24-b and those not so revisable is stated as follows in the case of *Moorehouse* v. *Pacific Warehouse & Steel Co.*, 177 Fed. Rep., 337, 339-340:

> "It is conceivable that the line of demarcation between 'proceedings in bankruptcy' and controversies at law and in equity, arising 'in the course of bankruptcy proceedings,' may in some cases be obscure; but generally speaking the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of a bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view

> to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public."

The order of April 2, 1912, was not one peculiar to a bankruptcy proceeding, but might have been entered in any case upon a proper showing, since Section 21 of the Judicial Code, under which the transfer herein was attempted to be justified, expressly applies "to any action or proceeding, civil or criminal," and that order was not, therefore, subject to revision as provided in Section 24-b of the Bankruptcy Act.

Furthermore, the order of April 2, 1912, could not have been reviewed on appeal to the Circuit Court of Appeals. Section 25-a of the Bankruptcy Act, under which appeals may be taken in bankruptcy proceedings to the Circuit Court of Appeals, provides as follows:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

It needs no argument to show that the order directing the transfer of the bankruptcy proceedings to Judge Mayer, was not within the scope of the above section.

Finally, it is submitted that petitioners had no right to relief in the Circuit Court of Appeals by way of mandamus. While it is true that the rule of the earlier cases—see *United States ex rel. Herless* v. *Judges of the U. S. Court of Appeals of Indian Territory*, 85 Fed. Rep., 177, and *Rosenbaum* v. *Bauer*, 120 U. S., 450—to the effect that circuit courts of appeals cannot exercise jurisdiction to grant mandamus except in aid of their own jurisdiction, and unless their jurisdiction has already attached, has been modified somewhat by later cases, petitioners submit that even under the rule as modified they were not entitled to the writ of mandamus from the Circuit Court of Appeals. The modified rule is stated as follows in *McClellan* v. *Carland*, 217 U. S., 268, 279-280:

> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

If Judge Chatfield had entered an order on his opinion of March 15, 1912, that order, it is true, could have been reviewed by the circuit court of appeals under Section 24-b of the Bankruptcy Act, and the case was therefore "within the appellate jurisdiction of the higher court." But the action of Judge Chatfield in refusing to continue jurisdiction over the bankruptcy proceedings is not unauthorized within the meaning of the rule announced

in *McClellan* v. *Carland, supra.* On the contrary, it finds sanction in the order of April 2, 1912, an order, be it noted, entered by the senior judge of the appellate court to which the petition in mandamus would have to be addressed. Furthermore, the action complained of is not primarily "the unauthorized action *of the court below.*" The source of petitioners' difficulties is not so much Judge Chatfield's refusal to continue to preside over the bankruptcy proceedings herein as it is the order of Judge Lacombe designating Judge Mayer to take jurisdiction of those proceedings and the subsequent action of Judge Mayer in conformity therewith. Certainly the remedy by mandamus from the circuit court of appeals, if open to petitioners, is wholly inadequate in view of the fact that the order attacked is that of the senior judge of that court. This fact differentiates the case from *Henry* v. *Speer,* 201 Fed. Rep., 869, where the circuit court of appeals reviewed, in a mandamus proceeding, *the order of a district judge refusing to retire from a case upon the filing of an affidavit of bias under Section 21 of the Judicial Code.*

It is submitted, therefore, that petitioners are, and have been at all times since the entry of the order of April 2, 1912, without right to relief in the circuit court of appeals either (*a*) on petition or application to revise that order, or (*b*) on appeal therefrom, or (*c*) by mandamus directing its vacation. The conclusion necessarily follows that unless petitioners are entitled to the writ of mandamus from this court they are remediless. This leads directly to a consideration of the propriety of issuing the writ under the facts of record in this proceeding, to secure the relief prayed for in the petition.

POOR COPY

B.

Mandamus is the proper remedy under the circumstances of this case.

1. *Petitioners are not attempting to control judicial discretion by mandamus.* The second paragraph of Judge Lacombe's return recites that the order of April 2, 1912, transferring the bankruptcy proceedings to Judge Mayer, was made "in the exercise of his judicial discretion." Petitioners admit that mandamus will not issue to control an inferior court in the exercise of its legitimate discretion, but are unable to see that this rule of law has any application here. Section 21 of the Judicial Code, in attempted conformity with which the order of April 2nd was entered, does not, by any stretch of construction, confer discretion upon circuit judges in designating the judge who is to take over the case or proceeding to hear or try which the original judge is disqualified, unless indeed it be a discretion as to the particular judge who shall be so designated. This is obviously not the kind of judicial discretion which cannot be controlled by mandamus, neither do petitioners seek to control it here, for their complaint is not that Judge Mayer should not have been designated to assume jurisdiction of the bankruptcy proceedings, but that no judge at all, except Judge Chatfield and his associate, Judge Veeder, had any legal right to assume charge of those proceedings. Section 21 provides that upon the filing of the affidavit the original judge "before whom the action or proceeding is to be tried or heard * * * shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in Section twenty-three, to hear such matter." Sections 20 and 23 provide only the formalities to be observed in the designation of a substitute judge by the

senior circuit judge and in the division of business among judges where there is more than one district judge of a district, respectively. These formalities are set out with precision and leave no room for the exercise of any discretion.

If section 21 confers any judicial discretion, which its imperative and precise language seems to negative, that discretion is to determine the sufficiency of the affidavit of bias and more properly belongs to the trial judge than to the senior circuit judge. In this case, however, neither Judge Chatfield nor Judge Lacombe exercised any discretion in that regard. The certificate of the former entered in the minutes of the court on March 29, 1912 (Petition, Ex. C, 38-40), expressly states that in his opinion "the intent of Section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias." Judge Lacombe's order of April 2, 1912, does not show that any consideration was given by him to the question of the legal sufficiency of the affidavit of bias, and his refusal later to issue a rule to show cause why the order should not be vacated leads necessarily to the inference that in his opinion the mere filing of the affidavit operated *ipso facto* to disqualify the judge against whom bias might be charged. In other words, if Section 21 confers discretion upon either the trial or the senior circuit judge, there was no attempt to exercise that discretion herein and the refusal to do so is a plain abuse of discretion. That an abuse of judicial discretion may be corrected by mandamus was held by this court as recently as the case of *Ex Parte Harding,* 219 U. S., 363.

Moreover, judicial discretion of the sort which it has been conceded, for the purposes of argument, section 21 confers, is not the kind of discretion that cannot be controlled by mandamus.

In the case of *Ex Parte State Bar Association,* 92 Ala., 113, 8 So., 768, the presiding judge refused

to hear proceedings properly before him for the disbarment of an attorney, on the ground that he (the presiding judge) was disqualified by interest. His contention that he was interested was based upon the fact that he was a member of the petitioning Bar Association, and paid annual dues thereto, and that if the Association had to pay the costs of such a proceeding, his distributive share of the property of the Association on dissolution would be diminished. The Court held that these facts did not show disqualification, and that mandamus was the proper procedure to compel the judge to try the case. The Court said (p. 769):

> "One of the original offices of the writ was to compel judicial officers who from whatever cause or upon whatever considerations wrongfully refused to act, to proceed with, hear and determine the case in hand. Their discretion will not be controlled; and in the decision of other questions arising on the trial of a cause, whether of law or of fact, with respect to the rights of the parties litigant in the subject matter involved, they, in the sense of this doctrine, have a discretion the exercise of which will in general be reviewed only on error or appeal when those remedies are adequate. But it can never rest in the discretion of a judge whether he will sit in a given cause. If he is not disqualified under the Constitution, it is his duty to sit; a duty which he cannot delegate or repudiate, and which no consent can devolve upon another. The inquiry is not what he has determined, but what are the facts in regard to his alleged incompetency? Is he in point of fact, as shown by his return to the alternative writ 'for any legal cause' incompetent to hear and determine the case presented?"

In the case of *State* v. *Dick*, 103 Wis., 407, 79 N. W. 421, a situation converse to that in the previous case was presented. In this case there was a

statute which provided that when a change of venue was granted on account of the prejudice of the presiding judge in any civil action pending in D. County, it might in the discretion of the Court be changed to the County Court of D. County unless it should appear that the judge of such county court was prejudiced. It was held that a circuit judge of D. County was bound to send to another circuit an action pending in his court on the plaintiff's affidavit alleging prejudice on the part of the circuit judge and of the judge of the D. County Court, and that mandamus was the proper means of compelling the judge to do so. The Court considered questions of this character as not within the scope of the exercise of judicial discretion. The case of *Crook* v. *Newburg,* 124 Ala., 27 So. 432, is much the same as the case just cited. There the State code provided (§2637) that no judge should sit in any proceeding in which he was related to either party within the fourth degree of consanguinity or affinity. The Court held that mandamus lay to compel a judge to certify his incompetency to the Register in Chancery of the County, in accordance with the provisions of §3381 of the Code.

To the same effect, see *State* vs. *Pitts,* 139 Ala., 152, 36 So., 20, where in a similar situation mandamus was held to be the proper remedy, though the writ was refused because the petition failed to state facts showing the disqualification of the judge.

The theory of these cases is that when a change of venue or designation of another judge is sought on grounds of bias or prejudice or interest, the granting or the refusing of such a change of venue or designation of a substitute judge is not such a discretionary matter as cannot be reviewed by mandamus. Hence, even should § 21 of the Judicial Code be construed to confer upon a judge sought to be disqualified, or upon the senior circuit judge,

POOR COPY

discretionary powers to decide whether or not the affidavit is sufficient, mandamus is none the less the proper remedy to review the action of the judge in deciding that the affidavit is or is not sufficient. This theory is in accord with the holding in the case of *Henry* vs. *Speer*, 201 Fed. Rep., 869, where the decision of the District Judge that the affidavit was insufficient was reviewed on petition for the writ of mandamus, though it is true that the writ was there refused on the ground that the affidavit omitted to state that the bias or prejudice of the judge was a personal one. In the present case, an even stronger situation is presented, inasmuch as Judge Chatfield declined to examine into the sufficiency of the affidavit, the mere filing of which, without more, he considered to disqualify him under § 21.

2. *Petitioners are not guilty of laches.* A large portion of the returns of Judges Lacombe and Mayer consist of a detailed narrative of the proceedings before the latter, and the special master appointed by him, since the order of April 2, 1912. Petitioners submit, however, that the facts so alleged do not warrant the imputation of laches to them. While there has been delay there has been no laches on the part of petitioners.

In cases where the defense of laches is relied upon, these three things must always be considered: (*a*) the length of time which has elapsed since the right sought to be enforced arose; (*b*) the knowledge, or means of knowledge, of the tardy suitor seeking relief; and (*c*) the change of circumstances, if any, making it impossible to put the parties in *statu quo*, and hence inequitable to grant the relief sought.

The importance of the lapse of a long time as an element of laches is emphasized in the following decisions: *Wetzel* vs. *The Minnesota Ry. Co.*, 169

U. S., 237, 241; *United States* vs. *Moore,* 12 How., 209, 222-223; *Lansdale* vs. *Smith,* 106 U. S., 391, 394; *Sena* vs. *United States,* 189 U. S., 223, 241.

Knowledge, or means of knowledge, as an element of laches, is emphasized in these cases: *Burke* vs. *Smith,* 16 Wall., 390, 401; *Foster* vs. *Mansfield, etc., R. R. Co.,* 146 U. S., 88, 89; *Johnson* vs. *Standard Mining Company,* 148 U. S., 360, 370; *Halstead* vs. *Grinnan,* 152 U. S., 412, 417.

The importance of a change in circumstances since the right accrued, making it inequitable to grant the relief sought, is brought out in the following cases: *Galliher* vs. *Caldwell,* 145 U. S., 368; *Abraham* vs. *Ordway,* 158 U. S., 416; *Gildersleeve* vs. *New Mexico Mining Company,* 161 U. S., 573; *O'Brien* vs. *Wheelock,* 184 U. S., 450.

In *Galliher* vs. *Caldwell, supra,* the Court said (p. 373):

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In the case of *Chapman* vs. *County of Douglas,* 107 U. S., 348, 355, this Court, speaking more particularly of the application of the doctrine of laches to mandamus proceedings, said:

> "And if, in such cases, a proceeding in *mandamus* should be considered to be the more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the Statute of Limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons,

> though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by *mandamus* must depend, in a great measure, on the character and circumstances of the particular case."

In this case about ten months elapsed between the entry of the order of April 2, 1912, and the initiation of this proceeding. But of this time, this court has been in session—and a means of relief open to petitioners—only for six months. There is of course no statute of limitations applicable here, from which by analogy it could be determined how long petitioners might wait with safety, inasmuch as the entry of the order of April 2, 1912, and the declination of Judge Chatfield to proceed further in the bankruptcy matter were not legal wrongs for which an action would lie, and would not, therefore, start a statute of limitations running. Certainly, however, such statutes very rarely, if ever, limit the period for beginning suit to less than a year. Furthermore, the delay, in this instance, is accounted for by the rapidity of the proceedings before the special master, to defend which consumed all of the time and efforts of petitioners' counsel and exhausted the court's allowance of counsel fees (Traverse, 12-13, 17-18). In the light of these circumstances, a delay of ten months, during only six of which relief was practically available, is, it is submitted, insufficient to satisfy the requirements of the doctrine of laches.

Petitioners were, of course, chargeable with knowledge of all the facts that developed in the course of the proceedings, but the allegations of the petition show that through error of their counsel they were not informed of their right to relief by mandamus until shortly before the institution of this proceeding (Petition, 13-14). Petitioners' ig-

norance of their legal rights should be considered as an extenuating circumstance.

But the controlling reason why petitioners should not be charged with laches is that there are no facts of record herein showing that their delay has proved prejudicial to anyone. Certainly it has not prejudiced the respondents. Nor have the creditors been thereby put in a position that will render the granting of the writ unjust to them. Nowhere are there any facts alleged in the returns from which it can be inferred that the creditors will necessarily be successful in their efforts before Judge Mayer to have the receivership extended over the property of the Barrel Company, or that the assets of that company are in danger of being dissipated. Moreover, throughout the entire period of delay the creditors might have brought plenary suit at any time to have the title to the Barrel Company's property ascertained judicially while the *res* was held intact under the opinion of Judge Chatfield of March 15, 1912 (194 Fed. Rep., 906) cited fully, *supra*. It is impossible to imagine any reason why the creditors have preferred, after two unsuccessful attempts, to endeavor a third time to get possession of the property of that company in summary fashion on mere motion in the bankruptcy court, rather than to bring an independent suit for the purpose of settling title to that property by regular jury trial. The absence of facts in the returns justifying reasonable belief that the creditors in the bankruptcy proceeding will be prejudiced by the issuance of the writ is decisive that laches cannot be imputed to petitioners for their delay.

The controlling importance of prejudice as an element of laches in mandamus proceedings is brought out in bold relief by two cases decided by this Court, in the one of which the writ was issued, after a delay of two years, because there was no

POOR COPY

showing of prejudice as a result of the delay, and in the other of which a similar delay was held fatal because of such a showing. The first case is *Duke* vs. *Turner*, 204 U. S., 623, in which the Court reviewed the facts and held that those facts did not disclose laches, in the following language, pages 631-632, which well summarizes the case:

> "Following, then, the rule recognized and approved in *Chapman* v. *County of Douglas*, *supra*, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?
>
> "We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan County, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the Supreme Court of the Territory, 5 Oklahoma, 188, and was remanded and refiled in the District Court on April 7, 1897.
>
> "The validity of the act was in controversy in the case of *Guthrie National Bank* v. *Guthrie*, and sustained in this court, April 3, 1899, 173 U. S., 528, reversing the Supreme Court of the Territory.
>
> "On the twenty-eighth day of June, 1901, Turner and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the District Court, and on appeal to the Supreme Court, that court holding that the remedy, if any, was by mandamus. 13 Oklahoma, 26. On the twenty-third day of July, 1903, this mandamus proceeding was begun.

> "These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in any wise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of the warrants by various holders in different courts without beneficial results until the present action."

The other case is *Matter of Eastern Cherokees*, 220 U. S., 83. There the writ was sought to require the Court of Claims to modify its decree, for the distribution of a certain fund among the Eastern Cherokee Indians on a *per capita* basis, so as to conform to the decree of this Court awarding a distribution *per stirpes*. Petitioners waited, however, until the fund had been substantially disbursed. The writ was accordingly refused on the ground that its allowance would require the Government to pay twice.

In the light of these cases, it is submitted that the absence of showing from which an inference is warranted that the issuance of the writ will injure the creditors in bankruptcy, absolves the petitioners of any laches in applying for mandatory relief.

3. *Under the facts of record, mandamus will be an effective remedy.* The return of Judge Chatfield sets forth that since the order entered by Judge Lacombe, transferring jurisdiction of this bankruptcy proceeding to Judge Mayer, he has taken no action therein, assuming such transfer of jurisdiction to have been effected under §21, or if not then within the terms of the order entered in his court on May 22, 1912, and to which special reference is made in the traverse filed by the petitioners, and copy of such order exhibited with such traverse at page 20. That order purports to be based upon the

POOR COPY

concluding provision of §97 of the Judicial Code (36 Stats. Part 1, p. 1120), which reads:

> "The judge of any district in the State of York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge."

We do not find in the Judicial Code any such provision with respect to any other State. Everywhere throughout the United States, such designation is made by the circuit judge, or in his absence by the circuit justice of the circuit in which the district lies, where another district judge is required to hold court in the event of disability of the judge of such district or the accumulation or urgency of business, as is set forth in §§13 to 19, inclusive of the Judicial Code (36 Stats. Part 1, pp. 1089-90). The provision in §97, therefore, is special legislation, but its use or application, we submit, must be in harmony with the causes requiring such judicial service, as are set forth in §§13 and 14 of the Judicial Code, that is, as relating to (1) the disability of the district judge, or (2) "when from the accumulation or urgency of business in any district court, the public interests require the designation," etc. It is therefore very clear that thus considered, or even as standing alone, the language of §97 was not intended to confer the power of designation without assignment of *any* reason therefor and *without limit* either as to time or subject matter.

The order entered on May 22, 1912, by Judge Chatfield and his associate, District Judge Veeder (Exhibit "G", p. 20 of petitioners' traverse), reads as follows:

> "At a Stated Term of the District Court of the United States of America, for the

Eastern District of New York, held at the United States Court Rooms, in the Borough of Brooklyn, City of New York, on the 22nd day of May, A. D. 1912.

"Present: The Honorable Thomas I. Chatfield and Van Vechten Veeder, District Judges.

"In the matter of requesting the Judges of the Southern District of New York to perform the duties of Judge of this District.

"Whereas, it is provided by §97 of the Act of Congress, approved March 3, 1911, known as the Judicial Code, that 'The Judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge.'

"NOW THEREFORE, it is upon the request of Thomas I. Chatfield and Van Vechter Veeder, resident judges of the United States district court for this district;

"ORDERED, That the Honorable Julius M. Mayer, Judge of the District Court of the Southern District of New York, be authorized by this request and designated, and is so authorized and designated to perform the duties of Judge of this District at all times and that this order be entered in the minutes of the Court.

THOMAS I. CHATFIELD,
VAN VECHTEN VEEDER,
United States District Judges."

It will be noted that this is a blanket order, embodying the request of the District Judges Chatfield and Veeder, and designating Judge Mayer "to perform the duties of Judge of this District AT ALL TIMES," and directing "that this order be entered in the minutes of the Court."

POOR COPY

By §14 of the Code, it is plain that the District Judge appointed under the authority thereof to serve in another district must sit within the district to which he is thus named, for the language of that section is that—

> "Such circuit judge or justice may designate or appoint a judge of any other district in the same circuit to have and exercise *within the district* thus named, the same powers that are vested in the judge thereof. Each of the district judges may in case of such appointment hold separately at the same time a district court *in such district*, and discharge all of the judicial duties of the district judge therein."

It is manifest that these designations under §§ 13 and 14 of the Code are not thereby intended to be permanent. For by § 17 the power runs "during the time for which he is so appointed." But in this order of May 22, 1912, two judges of the Eastern District seek to confer blanket authority upon Judge Mayer to *"at all times* perform the duties of a judge in the Eastern District," and thus, by a single order or request, two judges of the Eastern District, without suggestion of any need therefor arising from disability or press of business, attempt to confer upon a named judge for the Southern District the power to there perform all the duties of each such resident judge, and without limit of time. Taking the Judicial Code, in § 13, *et seq.*, and the quoted language of § 97 thereof, we submit that the attempted exercise of power was wholly ineffectual to invest Judge Mayer with jurisdiction in this case, and could not have retroactive operation to legalize his prior acts and orders in this bankruptcy proceeding.

Neither the return of Circuit Judge Lacombe nor District Judge Mayer makes reference to this order, referred to by Judge Chatfield. Judge Mayer's

return bases his exercise of jurisdiction herein solely upon the order entered by Circuit Judge Lacombe on April 2, 1912, upon the assumed authority of § 21 of the Code. When the request or order of May 22, 1912, was entered by Judge Chatfield, this case was not then before him in fact, because, as his return shows, he treated the same as having been transferred from his court by the order of Circuit Judge Lacombe. Hence, although we insist that such order of May 22, 1912, was far in excess of the authority conferred by § 97 of the Code, it could not have been intended to apply to a case then in fact withdrawn from Judge Chatfield's jurisdiction by the prior order of April 2. The validity of these proceedings must therefore be determined as of April 2, 1912, when the order transferring the cause was signed by the Circuit Judge. The order of Judge Mayer in overruling the decision of Judge Chatfield, and referring to a Master the summary proceeding instituted by the creditors to seize the assets and property of the American Steel Barrel Company, was entered on April 22, 1912, and the proceeding has since been conducted on the assumed authority of that order. Hence, in no view could the order entered by Judge Chatfield on May 22, 1912, legalize proceedings taken long prior thereto, and of which these petitioners complained and are seeking relief.

* * * * * *

That the order of May 22, 1912, was far too broad and hence not justified by Section 97, is made plain by observing:

1. That under Sections 13 and 14 of the Judicial Code, the fact of the disability of the district judge (Sec. 13) or "the accumulation or urgency of business in any district court" (Sec. 14) must be made to appear "by the certificate of the Clerk under the seal of the Court" to any circuit judge of the circuit or in their absence to the circuit justice of such

POOR COPY

circuit whereupon the designation and appointment of another district judge is made to act "during such disability" in the one case and "during the time for which he is so appointed" in the other, for Section 19 makes it obligatory on the designated judge to act "during the time for which he is so appointed."

It is hence plain that such designation and appointment cannot be for an indefinite time. But by the terms of the order of May 22, 1912, no reason is assigned for such designation and no limit of time whatsoever is named.

2. Clearly Section 97 was not intended in these regards to be broader than the powers of appointment conferred on the circuit justice or the circuit judges by Sections 13 *et seq.* of the Code. Section 97 is *sui generis* in permitting district judges in New York only to so act by mere request of one of them, but fair interpretation of the language of Section 97, in the light of these general provisions of the Code, relating directly to the same subject, cannot put the extent of the power conferred by Section 97 on the district judges far beyond the limitations contained in Sections 13 *et seq.* upon the like powers of the circuit justice or circuit judges. To so contend would at once not only *displace* these general sections from all application to the State of New York, but put in the hands of the district judges in that State an independent and uncontrolled power denied to the district judges elsewhere throughout the entire federal jurisdiction. Matter of mere convenience or other reasons having no relation to either disability or accumulation or urgency of business which in the public interests required attention, would be sufficient to authorize such designation. We submit Congress did not intend to legislate to any such result. Section 97 should hence be construed as

subordinate to the general provisions of the Code which deal with the same subject, and as requiring like causes to appear of record as justifying designation thereunder and to be limited in purpose and time as by these general sections clearly intended.

3. That Section 97 was intended to have much narrower operation appears from the language thereof. It reads:

> "The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; *and in such cases* such judge shall have the same powers as are vested in the resident judge" (italics ours).

Now, the words *"and in such cases"* plainly imply that the request and designation is limited "to such cases" as are designated in such request. Thus construed, Section 97 permits the resident judge to call to his temporary aid the services of another district judge to so act in designated cases. By any other construction the singular and embarrassing result would obtain that in the State of New York alone the general provisions of the Judicial Code on this subject would be entirely controlled and superseded by Section 97, and thus the circuit justice or circuit judges would lose all control of the personnel of the district judges therein. The orderly administration of the law provided for and placed under such superior control throughout the rest of the country would in this single instance be displaced and put beyond such control. The several districts in the State of New York would hence be judicially controlled in precisely the opposite manner to the rule prescribed everywhere else throughout the United States. If such were the result under Section 97, then we repeat, Con-

POOR COPY

gress is subject to the charge of having placed New York wholly without the supervisory power provided for in all other States. We submit Congress did not so intend and its legislation cannot properly be so applied.

That the proceedings before Judge Mayer gain no validity by virtue of the order of May 22, 1912, appears further from the language of the last clause of Section 97, under which that order was attempted to be made, providing that the judge designated as therein prescribed "shall have the same powers as are vested in the resident judge." The question at once arises, "What were the powers of the resident judges of the Eastern District of New York, with respect to the bankruptcy proceedings herein on May 22, 1912?" Those judges were, it is submitted, powerless to act in the matter, because of the order of April 2, 1912, which, until vacated by proceedings initiated by some one of the parties to the bankruptcy suit, operated to deprive both of the resident judges of jurisdiction thereover. Under Section 97, Judge Mayer could acquire no greater power to direct the bankruptcy proceedings than the resident judges of the eastern district possessed, and the order of May 22, 1912, can, therefore, have no relation to those proceedings, however effective it may be as to other matters.

The petitioners do not seek delay by this proceeding. But as Judge Chatfield had carefully heard and fully sustained their contention to have determined, by plenary suit and according to the law of the land, the right and title to the property both claimed by and in the possession of the Barrel Company, they resist the effort to compel that adjudication by summary proceeding in bankruptcy. And as the petitioning creditors could, as expressly ruled by Judge Chatfield, have had the benefit of restraining orders holding the *res* in controversy from any disposal adverse to the creditors, they

were amply protected while the issue of ownership might be tried by independent suit in the proper way open to all other citizens disputing the ownership of property.

Respectfully submitted,

ALDIS B. BROWNE,
Attorney for Petitioners.

ALDIS B. BROWNE,
JOHN C. SPOONER,
LOUIS O. VAN DOREN,
G. MURRAY HULBERT,
Of Counsel.

87

Office Supreme Court, U. S.
FILED.
APR 21 1913
JAMES H. McKENNEY,
CLERK

UNITED STATES SUPREME COURT,

No. 14, ORIGINAL. OCTOBER TERM, 1912.

Ex Parte, AMERICAN STEEL BARREL COMPANY
AND ELIZABETH C. SEAMAN,
Petitioners.

BRIEF FOR RESPONDENTS,

Hon. E. Henry Lacombe and Hon. Julius M. Mayer.

JOHN A. GARVER,
EDWIN T. RICE,
CHARLES A. RIEGELMAN,
Counsel for said Respondents.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

INDEX.

	PAGE
Nature of the Application	1
Statement of Facts	2
The Returns:	
I. The Return of Judge Lacombe	6
II. The Return of Judge Mayer	7
Section 21 of the Judicial Code	9

POINTS.

FIRST. Jurisdiction of this Court in mandamus proceedings	10
SECOND. Principles applicable to the facts of this case	11
THIRD. No mandamus against Judges Lacombe and Mayer	14
FOURTH. No mandamus against Judge Chatfield	15
FIFTH. Petitioner's right to review	16
SIXTH. The petition should be denied in the exercise of the Court's discretion	17
SEVENTH. Section 21 of the Judicial Code does not violate the Constitution	19
EIGHTH. The so-called Traverse	25
NINTH. The application should be denied	30

Table of Cases.

	PAGE
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S., 372	12, 13, 16
Atlantic City R. Co., *In re*, 164 U. S., 633	12
Bachmann *v.* City of Milwaukee, 47 Wis., 435.	23
Bassford *v.* Earle, 162 Cal., 115	23
Brooks *v.* State, 162 Ind., 568	12
Brownsville *v.* Loague, 129 U. S., 493	13
Chapman *v.* County of Douglas, 107 U. S., 348	11
Coder *v.* Arts, 213 U. S., 223	16
Conn *v.* Chadwick & Co., 17 Fla., 428	23
Conn. Mutual Life Insurance Co., *In re*, 136 U. S., Appendix, CLXXX	12
Cox *v.* United States, 100 Fed., 293	23
Crane, *Ex parte*, 5 Pet., 190	13
Cumings *v.* Armstrong, 34 W. Va., 1	25
Douglas *v.* Loomis, 5 W. Va., 542	25
Duke *v.* Turner, 204 U. S., 623	11
Farrell *v.* King, 41 Conn., 448	12
German Insurance Co. *v.* Landram, 88 Ky., 433	22
Glaser, *In re*, 198 U. S., 171	10
Hawkins, *In re*, 147 U. S., 486	13
Henry *v.* Speer, 201 Fed., 869	19, 20
Hudson *v.* Parker, 156 U. S., 277	13
Huguley Manufacturing Co., *In re*, 184 U. S., 297	12
Iron Clad Mfg. Co., *In re*, 191 Fed., 831	4
Iron Clad Mfg. Co., *In re*, 194 Fed., 906	3, 4
Iron Clad Mfg. Co., *In re*, 197 Fed., 280	8
Iron Clad Mfg. Co., *In re*, 201 Fed., 66	6

PAGE

James *v.* Appel, 192 U. S., 129..... 24

Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed., 567..... 24
Key, *In re*, 189 U. S., 84.....11, 12, 13
Knickerbocker Insurance Co. *v.* Tolman, 80 Ill., 106..... 23
Krutz *v.* Griffith, 68 Ind., 444..... 23

Lincoln *v.* Territory, 8 Okla., 546..... 23
Livingston *v.* Story, 9 Pet., 632..... 24

Manly *v.* State, 52 Ind., 215..... 23
Marbury *v.* Madison, 1 Cranch., 137..... 12
Martin *v* Hunter's Lessee, 1 Wheat., 304..... 23
Massachusetts, *In re*, 197 U. S, 482 10
McGoon v. Little, 7 Ill., 42..... 23
Missouri *v.* Murphy, 170 U. S., 78..... 13
Morgan, *Ex parte*, 114 U. S., 174..... 13
Morrison, *In re*, 147 U. S., 14..... 12

Pennsylvania Company, *In re*, 137 U. S., 451. 12
People *v.* Assessors, 137 N. Y., 201..... 11
People *v.* Common Council, 78 N. Y., 56..... 11
People *v.* Compton, 123 Cal., 403..... 23
People *v.* Judge, 23 Mich., 536..... 25
People *v.* Kipley, 171 Ill., 44..... 12
Potter *v.* Beal, 50 Fed., 860... 16
Purvis *v.* Frink, 55 Fla., 715..... 23

Rex *v.* The Mayor of London, 1 T. R., 423... 11
Rice, *In re*, 155 U. S., 396..... 12, 13
Rinis *v.* Boyd, 7 Wis., 134..... 23

State *v.* Clancy, 30 Mont., 529..... 23
State *v.* Clifford, 65 Wash., 313..... 22
State *v.* Dirlam, 28 Ohio C. C. R., 69 23
State *v.* Gardner, 88 Minn., 130 22
State *v.* Gray, 100 Mo. App., 98..... 22
State *v.* Hoist, 111 Minn., 325..... 22

PAGE

State *v.* Kent, 4 No. Dak., 577 23
State *v.* Montgomery, 160 Mo. App., 724..... 22
State *v.* Palmer, 4 So. Dak., 543..... 22
State *v.* Shaw, 43 Ohio St., 324..... 23
State, *ex rel.* Tyrell *v.* Judge, 33 La. Ann., 1293..... 23
Stuart *v.* Laird, 1 Cranch, 299..... 24

United States *v.* Addison, 22 How., 174..... 11
United States *v.* Blaine, 139 U. S., 306..... 13
United States *v.* Lamont, 155 U. S., 303..... 13
United States *v.* Murphy, 3 Wall., 649..... 24
United States *v.* Union Pacific R. Co., 98 U. S., 569..... 23, 24

Vance *v.* Field, 89 Ky., 178..... 22

Wayman *v.* Southard, 10 Wheat., 1..... 24

United States Supreme Court.

OCTOBER TERM, 1912.

No. 14, ORIGINAL.

Ex Parte AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

BRIEF FOR RESPONDENTS,

Hon. E. Henry Lacombe, Senior Circuit Judge for the Second Circuit, and Hon. Julius M. Mayer, a District Judge of the United States for the Southern District of New York, acting under designation in the Eastern District of New York.

Nature of the application.

Petition for a writ of mandamus, to compel Honorable Thomas I. Chatfield, a District Judge of the United States, for the Eastern District of New York, to sign and enter an order on a decision made by him in the course of the bankruptcy proceedings in the matter of the Iron Clad Manufacturing Company, Bankrupt, and to exercise jurisdiction in the said matter.

(NOTE: The references are to the folio numbers. The last folio number in the moving papers is 134. For convenience, the Returns of Judges Lacombe and Mayer have been folioed continuously, beginning with folio 136).

Incidentally, relief is prayed for, that an order made by Judge Lacombe, on April 2, 1912, designating Judge Mayer to exercise, in the said matter, the powers of a District Judge of the Eastern District, be vacated and set aside, and that all proceedings before Judge Mayer, pursuant to such designation, be vacated and set aside (fols. 44-46). The Court is also asked to direct the "District Judges" to exercise jurisdiction (fol. 46), although Judge Van Vechten Veeder, the other District Judge of the Eastern District, is not made a party to this proceeding.

The statements contained in the affidavit of Thatcher M. Brown, annexed to the petition as Exhibit A, as well as the statements contained in the other Exhibits of the petitioners, must be accepted as true, inasmuch as they are not controverted.

Separate Returns have been made by Judges Lacombe and Mayer. The petitioners have filed a Traverse to these Returns, thus raising various issues of fact.

Statement of facts.

A petition in bankruptcy was filed against the Iron Clad Manufacturing Company, in the Eastern District of New York, on May 23, 1911, and, on that day, Judge Veeder, one of the Judges of the Eastern District, appointed a Receiver (fols. 54-5). An adjudication of bankruptcy against the Company was rendered, after a trial before Judge Chatfield and a jury, upon the direction of the Court, on December 2, 1911 (fol. 13).

In June, 1911, certain creditors of the bankrupt applied to the Court for an extension of the receivership to the capital stock, property and assets of the American Steel Barrel Company, one of the petitioners herein (fol. 14), upon the ground that these assets belonged to the bankrupt (fols. 67-8). The petitioner, Elizabeth C. Seaman, owned all of the

capital stock of both Companies; and she had made statements, under oath and otherwise, upon which she had obtained credit for the bankrupt, that the Barrel Company was merely a subsidiary or department of the bankrupt (fols. 68-71). In September, 1910, she had filed a verified return with the Collector of Internal Revenue, and in November, 1910, an amended return, showing in a single statement the affairs of the Iron Clad Manufacturing Company and the American Steel Barrel Company as one organization; such return and amended return being verified by her as president and treasurer of both corporations; and on September 29th, 1910, she had addressed a letter to the Collector, referring to the said return and stating that the American Steel Barrel Company was a subsidiary company, which had never been separated from the main company, and that it was simply a department and that it was impossible to divide or separate them (fols. 71-72).

That application was heard, on affidavits, by Judge Chatfield, who denied it "for the present" but stated that it might be reheard before Judge Veeder, if the latter would consent to hear it (fols. 72-3). Judge Veeder declined to do this, but suggested that it would be more satisfactory to dispose of the application upon a reference than upon conflicting affidavits (fol. 73). Judge Chatfield declined to direct a reference; and on July 17, 1911, he entered an order denying the application, on the ground that the bankruptcy court could not determine the question summarily. That he did not give the subject any real consideration, but decided it "upon a cursory examination of the papers" appears from a subsequent opinion written by him in March, 1912, reported in 194 Fed. Rep., 906, 917.

The order of Judge Chatfield was reversed by the Circuit Court of Appeals, in November, 1911, on the ground that the petitioning creditors were entitled to have the bankruptcy court make an inves-

tigation summarily to decide whether or not the claim of adverse ownership by the American Steel Barrel Company was merely colorable or made in good faith (191 Fed., 831).

Upon the settlement of the order on the mandate of the Circuit Court of Appeals, Judge Chatfield stated that he would not grant a reference (fol. 75). Owing to the adjudication in bankruptcy and the appointment of the Trustee meantime, an amended and supplemental petition was filed on December 15, 1911 (fol. 76). Thereafter, Judge Chatfield set the matter down for a hearing upon the original record and such further affidavits "or testimony" as might be presented (fols. 76, 107). On the day set for the argument, counsel for the petitioning creditors and Trustee appeared, and again made a request for an order of reference, which was denied, while the time of Elizabeth C. Seaman and others to plead, was further extended (fol. 78).

Thereafter, on January 26, 1912, the matter was submitted to Judge Chatfield, on behalf of the petitioners, upon a brief, which expressly asked that an opportunity be given to take testimony either upon a reference or in open court, upon the issues raised by the papers (fol. 79).

On March 15, 1912, Judge Chatfield filed an opinion (fols. 15–16, 79), in which the statement was made, contrary to the facts set forth in the affidavit of Thatcher M. Brown annexed to the petition herein (fols. 75, 78, 79), that an opportunity had been given to the parties to call witnesses but that they had failed to do so (194 Fed., 906, 909). Thereupon, on behalf of the petitioning creditors and the Trustee, a motion was made, returnable on March 29, 1912, before Judge Veeder, who was then holding Court, to reopen the application for the extension of the receivership and for a direction that the petitioners be permitted to take testimony and that, meantime, no order should be entered upon the decision of Judge Chatfield (fols. 16-17). That

application was referred by Judge Veeder to Judge Chatfield (fols 17, 113-14).

At this point, and before the application for a rehearing was heard by Judge Chatfield (fol. 115), the petitioning creditors filed an affidavit and certificate of bias, under Section 21 of the Judicial Code (fols. 18, 51, 110). Judge Chatfield, while stating that he "might" question many of the statements contained in these papers (fol. 117), did not do so, but declared that he would "proceed no further in this motion" (fol. 116); and he directed the Clerk to send an authenticated copy of his statement to Judge Lacombe, the Senior Circuit Judge of the Second Circuit (fol. 116), apparently assuming that he had no power to pass upon the matter (fol. 118). The Clerk transmitted the statement accordingly, on March 29, 1912 (fols. 19, 119); and, thereupon, on April 2, 1912, Judge Lacombe, having examined the papers, designated and appointed Judge Mayer to exercise, in the Eastern District of New York, the powers vested in the District Judges of that District (fols. 123-5).

The motion to reopen the application for the extension of the receivership, which was pending at this time, was heard by Judge Mayer on April 11, 1912 (fol. 25). By an order, dated April 22, 1912, Judge Mayer granted a reference to a Special Master to take proof and report, meantime staying the entry of an order upon the opinion of Judge Chatfield (fols. 24-7, 127, 134), after conferring with Judge Chatfield (Return of Chatfield, *J.*, fol. 6).

Since April 2, 1912, all proceedings in the matter of the bankruptcy of the Iron Clad Manufacturing Company have been before Judge Mayer (fol. 30). Prior to that date, the petition shows that some of the proceedings were before Judge Chatfield and some before Judge Veeder (fols. 28-9). In other words, Judge Chatfield did not have sole charge of those proceedings.

THE RETURNS.

I. The Return of Judge Lacombe.

The Return of Judge Lacombe corrects an obvious error (fol. 138) in the copy of the affidavit of Thatcher M. Brown, annexed to the petition, and shows that the order of April 2, 1912, authorizing Judge Mayer to exercise the powers of the District Judges of the Eastern District, in the matter of the Iron Clad Manufacturing Company, was made after an examination of the papers submitted and in the exercise of judicial discretion (fol. 139). Judge Veeder had previously made a request to be relieved from acting further in the matter (fol. 141).

On May 14, 1912, Judge Mayer made an order, directing the petitioners, The American Steel Barrel Company and Elizabeth C. Seaman, to produce before the Special Master certain books and records of the Steel Barrel Company, and, upon their failure to comply with the order, he adjudged them, respectively, guilty of contempt, by orders made on June 14, 1912, and July 3, 1912. Upon the application of the present petitioners, these orders were reviewed by the United States Circuit Court of Appeals (fol. 143), which affirmed the orders of May 14, 1912, and June 14, 1912, but reversed that of July 3, 1912 (201 Fed. 66). In the course of its opinion in that matter, the Circuit Court of Appeals thus referred to the petitioner, Elizabeth C. Seaman (pp. 69, 70):

> "Her own evidence is very unsatisfactory and seems to indicate that no reliance can be placed on any statement she may make; but if her testimony be struck out as untrustworthy, there is no other evidence sufficiently convincing to warrant her imprisonment for contempt. . . . It is quite apparent from this record that throughout this bankruptcy proceeding, Mrs. Seaman has been repeatedly contumacious; when under examination, flippant, defiant, impertinent, evasive and self-contradictory."

No attempt was made to have the United States Circuit Court of Appeals revise the order of April 2, 1912; and that order has been continuously in operation ever since (fol. 145).

II. The Return of Judge Mayer.

Upon the hearing by Judge Mayer, on the motion to reopen the application for the extension of the receivership, the present petitioners appeared and were heard in opposition (fol. 166). Under the order of reference of April 22, 1912, to the Special Master, there have been hearings upon at least fifty days, at which over 2,000 pages of testimony have been taken (fol. 168). Upon these hearings, the present petitioners were represented by counsel (fol. 167).

Not only have these particular proceedings been pending before the Special Master; but various other motions and interlocutory proceedings have been heard before Judge Mayer, some instituted by the Trustee in Bankruptcy, and some by the petitioners themselves (fol. 172); and no objection to the conduct of these proceedings by Judge Mayer was made prior to January 29, 1913, when a motion was made on behalf of the petitioners to compel a substitution of attorneys. Then, for the first time, it was stated that the question of jurisdiction arising out of the designation of Judge Mayer would be raised (fol. 176).

On March 5, 1913, when the order to show cause herein was issued by this Court, the following matters in connection with the bankruptcy proceedings were pending before Judge Mayer (fols. 177–8):

1. An application by the attorneys for the petitioning creditors for an allowance for services rendered in the bankruptcy proceedings;
2. A similar application by counsel for the Receiver;

3. An application to punish the present petitioners for contempt;
4. An application to compel the petitioner, The American Steel Barrel Company, to pay the fine of $2500, imposed by the order of June 14, 1912, and affirmed by the Circuit Court of Appeals;
5. A proceeding, instituted by the present petitioners, to determine the value of the services of the former attorney of the petitioners herein.

Sufficient facts are set forth in the Return of Judge Mayer to show that the American Steel Barrel Company is but a name, behind which Mrs. Seaman is masking, and that the protagonist in this wretched drama is Elizabeth C. Seaman, who has put forth every effort to appropriate to her own use what she herself represented to the creditors of the bankrupt was a valuable asset, going so far as to put the creditors to the expense of establishing the insolvency of the bankrupt in a jury trial, and then carrying the case to the Circuit Court of Appeals after she had filed schedules as an officer of the Iron Clad Manufacturing Company showing its insolvency (197 Fed., 280, 283); and the net assets of that Company, now held by the Trustee, are only about $10,000, as against about $650,000 of liabilities (fol. 174). As Judge Mayer said, in his opinion of June 25, 1912 (fol. 199): "The record shows a persistent course of contumacious conduct and a painful disregard for the administration of justice"; while the statements contained in Mrs. Seaman's affidavits are characterized by Judge Mayer as a "maze of contradiction and evasion" (fol. 200).

Section 21.

Section 21 of the Judicial Code, under which Judge Chatfield was disqualified, is as follows:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit *and application* are made in good faith. The same proceedings shall be had when the presiding judge shall file with the Clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

POINTS.

FIRST.

Jurisdiction of this Court in mandamus proceedings.

I. The jurisdiction of this Court, in mandamus proceedings, is conferred by Section 234 of The Judicial Code, which is as follows:

> "The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

The Section is a re-enactment of Section 688 of the Revised Statutes, the substantial part of which constituted Section 13 of the Judiciary Act.

The power to issue writs of mandamus is exercised by this Court only in cases where it has original or appellate jurisdiction.

In re Massachusetts, 197 U. S., 482;
In re Glaser, 198 U. S., 171.

II.—This Court has neither original nor appellate jurisdiction in the present case. The application should have been addressed to the Circuit Court of Appeals for the Second Circuit, under Section 262 of the Judicial Code, which confers upon that Court the power to issue all writs not specifically provided by statute, "which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

SECOND.

Principles applicable to the facts of this case.

I. An application for a mandamus is addressed to the sound discretion of the Court.

Rex *v.* The Mayor of London, 1 T. R., 423, 425-6;
In re Key, 189 U. S., 84, 85.

The petitioner must come into court with clean hands. He cannot acquiesce in an act and subsequently complain of it. He must assert his rights promptly, especially where the rights of third persons are concerned; and the writ will not be issued if its effect might be to cause confusion or disorder or substantial injustice to others.

2 Spelling on Injunctions and other Extraordinary Remedies (2nd ed.), Secs. 138, 1371, 1382;
26 Cyc, 150, 157;
People *v.* Common Council, 78 N. Y., 56, 63;
People *v.* Assessors, 137 N. Y., 201;
Chapman *v.* County of Douglas, 107 U. S., 348;
Duke *v.* Turner, 204 U. S., 623, 629, 631, 632.

And the writ will not ordinarily be issued if it can be issued only by declaring a statute unconstitutional.

26 Cyc, 156.

II. The writ will not be issued where there is another remedy by appeal, writ of error, or otherwise.

26 Cyc, 173;
2 Spelling, Secs. 1369, 1374, 1390, 1392;
U. S. *v.* Addison, 22 How., 174;

Marbury *v.* Madison, 1 Cranch, 137, 169;
In re Conn. Mut. Life Ins. Co., 136 U. S., Appendix, CLXXX;
In re Pennsylvania Co., 137 U. S., 451, 453;
In re Morrison, 147 U. S., 14, 26;
In re Atlantic City R. Co., 164 U. S., 633, 635;
In re Key, 189 U. S., 84, 85.

The writ will not be used to perform the office of an appeal or writ of error, even though no right to review is given.

2 Spelling, Secs. 1373, 1390;
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S , 372, 379;
In re Rice, 155 U. S., 396.

It necessarily follows, that the writ will not issue to correct or review interlocutory proceedings.

In re Atlantic City R. Co., 164 U. S., 633;
In re Huguley Mfg. Co., 184 U. S., 297.

III. The sole function of the writ is to compel affirmative action by one who has refused to perform his legal duty. Mandamus cannot be resorted to to restrain action or to undo an act. Persons who are not required to perform the act are, therefore, not proper parties.

Farrell *v.* King, 41 Conn., 448;
People *v.* Kipley, 171 Ill., 44, 91;
Brooks *v.* State, 162 Ind., 568.

IV. The relator's right to the writ must be clear and absolute. He must show a duty imposed by law upon the respondent, which the respondent has

refused to perform, in violation of some legal right of the relator.

2 Spelling, Secs. 1368–1370;
United States *v.* Blaine, 139 U. S., 306, 319;
United States *v.* Lamont, 155 U. S., 303, 308;
Missouri *v.* Murphy, 170 U. S., 78, 95;
In re Key, 189 U. S., 84, 85.

The writ issues to a judge, to compel judicial action, only when he has wrongfully refused to act.

Ex parte Crane, 5 Pet. 190, 211.

It follows, that the writ can issue only to the person who had failed in his duty; and that person must, of course, have the power to perform the act.

Brownsville *v.* Loague, 129 U. S., 493, 501.

A judge would not be bound to perform an act, if, by so doing, he would violate an order in the matter made by another judge of the same Court.

2 Spelling, Sec. 1378.

V. While this Court may, by mandamus, direct the performance of a judicial duty, it cannot direct or control the exercise of judicial discretion.

Ex parte Crane, 5 Pet., 190, 194;
Ex parte Morgan, 114 U. S., 174;
In re Hawkins, 147 U. S., 486, 490;
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S., 372, 379;
In re Rice, 155 U. S., 396, 403;
Hudson *v.* Parker, 156 U. S., 277, 283.

VI. The powers of the Court in a case of this kind were summed up, with admirable conciseness, by Caldwell, *J.*, in People *v.* Colorado Cent. R. Co. (42 Fed., 638, 640):

> "The writ of mandamus is no longer a prerogative writ, but is now regarded as in the

nature of an action by the relator against the respondent for the enforcement of a legal right or duty, which cannot be fully or adequately enforced in any other mode. It is used only to compel action and enforce the performance of a pre-existing duty. One who invokes its powers must show a clear legal right to have the act performed, and performed in the manner prayed for, and by the person or corporation sought to be coerced. Every fact essential to the exercise of the jurisdiction must be distinctly stated and the relator's right to the relief he seeks must be clearly made to appear by the averments of the petition and alternative writ. It must be made to appear that the writ will be effectual as a remedy, and that the court granting it has the jurisdiction to enforce compliance with its commands. Whether a writ of mandamus shall be issued is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances."

THIRD.

No mandamus against Judges Lacombe and Mayer.

The petition must be dismissed as to Judges Lacombe and Mayer, because this Court is not asked to compel either of these Judges to do anything. The petitioners complain of what the Judges have done, not of what they have refused to do. But the acts of the Judges are not before this Court for review; and as this is not a suit of original jurisdiction in equity, there is no power to vacate and set aside any of the orders or decrees referred to in the petition.

FOURTH.

No mandamus against Judge Chatfield.

The mandamus prayed for against Judge Chatfield is (1) to compel him to "sign and enter an order" on his decision of March 15, 1912 (fols. 44–45); and (2), to compel him to "exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th day of March, 1912" (fol. 46).

I. Even if the designation of Judge Mayer to act in the Eastern District was absolutely void, Judge Chatfield could not be compelled to sign and enter an order on his decision of March 15, 1912, because the motion to reopen, which was pending at the time of the entry of Judge Lacombe's order of April 2, 1912 (fols. 16–17, 113–14), has not been disposed of and is still pending. Moreover, by Judge Mayer's order of April 22, 1912, appointing a Special Master, the parties are enjoined from entering an order upon Judge Chatfield's opinion (fol. 134).

II. This Court has no power, in any event, to compel Judge Chatfield to exercise jurisdiction in the matter of the bankruptcy of the Iron Clad Manufacturing Company. There are two District Judges in the Eastern District, Judges Chatfield and Veeder (fols. 28–9). Section 23 of The Judicial Code permits those Judges to agree between themselves how the business shall be divided, and if they fail to do so, the Senior Circuit Judge (and not this Court) is required to direct the division.

The matters growing out of the bankruptcy of the Iron Clad Manufacturing Company have heretofore been disposed of by both of the District Judges (fols. 28–9); and even if it should be held that Judge Chatfield had not been properly disqualified, yet, under all the circumstances of this case, he should

be permitted to exercise his discretion as to whether, for the future, out of respect for the dignity of the Court, he would not prefer to leave the disposition of the Iron Clad matters to Judge Veeder, or to some other Judge to be appointed by the Senior Circuit Judge.

III. By the prayer of the petition, this Court is also asked to direct "the exercise of jurisdiction in said matter of Iron Clad Manufacturing Company and all proceedings incidental thereto and involved therein by the District Judges of the Eastern District of New York" (fol. 46). As this involves the exercise of jurisdiction by Judge Veeder, the other District Judge, and as he is not a party to this proceeding and as it is not claimed that he has failed in his judicial duty, it must be disregarded.

FIFTH.

Petitioners' right to review.

The petitioners will have an absolute right to review, in the Circuit Court of Appeals, any order that may be made in the pending proceeding, upon the coming in of the report of the Special Master; and possibly they have the right to review directly the order appointing the Special Master.

Bankruptcy Act, Secs. 24*b*, 25;
Loveland on Appellate Jurisdiction, Sec. 58;
Potter *v.* Beal, 50 Fed., 860 (C. C. A.);
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S., 372;
Coder *v.* Arts, 213 U. S., 223.

Upon such review by the Circuit Court of Appeals, the validity of Judge Lacombe's order of

April 2, 1912, appointing Judge Mayer, can, of course, be determined; for, if Judge Mayer had no power to make the order, the subsequent proceedings and final order would fall with the order originally made appointing the Special Master. As the right to review in an orderly manner thus exists, that fact alone must defeat this application.

SIXTH.

The petition should be denied in the exercise of the Court's discretion.

Even if the petitioners had shown a clear legal right to a mandamus, it should be denied in the exercise of the Court's discretion.

I. The facts appearing in the moving papers and in the Returns raise a strong presumption of bad faith against the petitioner, Elizabeth C. Seaman, and the corporation controlled by her and held out to the world by her as a mere subsidiary and department of the bankrupt. The very fact that she compelled the creditors to litigate the question of the solvency of the bankrupt (though the assets now held by the trustee do not exceed $10,000, as against $650,000 liabilities; fol. 174), when, by her own schedules, the Company was insolvent (197 Fed., 280, 283), is, in itself, sufficient to cast upon her the burden of affirmatively showing her good faith; and the unsparing denunciation of her conduct, made not only by Judge Mayer but by the Circuit Court of Appeals, can leave no doubt that the present proceeding is but another step in the persistent efforts made by her, during the past two years, to deprive the creditors of the only part of the estate of the bankrupt that has substantial value.

II. There has been a delay of a year in the settlement of this estate, since the order appointing Judge Mayer was made. Very large expense has necessarily attended the hearings before the Special Master, extending over fifty days and involving more than 2,000 pages of testimony (fol. 168), while there have been numerous other proceedings meantime incidental to the general bankruptcy proceedings (fol. 172). The only excuse given for this delay is that the petitioners were not aware of their alleged legal rights (fol. 41); which is no excuse at all, even if they had shown that they had any legal right to a mandamus from this Court.

III. The Returns of Judges Lacombe and Mayer show complete acquiescence by the petitioners in the appointment of Judge Mayer. Not only did the petitioners review, in the Circuit Court of Appeals, three orders made by Judge Mayer (fol. 143); but they appeared in other proceedings before Judge Mayer without objection (fol. 172); and there is now pending before him five matters, one of which was instituted by the petitioners themselves.

IV. To ignore what has been done since the appointment of Judge Mayer and to compel Judge Chatfield to exercise jurisdiction in the bankruptcy proceedings would result in confusion and uncertainty with reference to the proceedings that have been had and are still pending, and would seriously affect the rights of the Trustee in bankruptcy and of the creditors of the estate who are not before the Court.

SEVENTH.

Section 21 of The Judicial Code does not violate the Constitution.

I. In designating Judge Mayer to act in the Eastern District of New York, Judge Lacombe did no more than he had a right to do under Section 23, and no more than is ordinarily done upon the certificate of the Clerk under Section 14, in cases of an accumulation or urgency of business, or under Section 20, where a District Judge disqualifies himself.

II. Unless Section 21 was clearly in contravention of the Constitution, Judge Lacombe was required to designate another Judge to act instead of Judge Chatfield, if, in his opinion, a proper case had been made out for so doing; and, upon such designation, Judge Mayer was required, by Section 19, to discharge the duties of a District Judge in the particular matter referred to him.

III. Section 21 requires an affidavit to be made, stating the facts and reasons for the belief that bias or prejudice exists on the part of the Judge to be disqualified; and the affidavit cannot be filed unless accompanied by a certificate of good faith on the part of counsel. Judge Chatfield approved the formal sufficiency of the affidavit and certificate, in declining to proceed further and in referring the matter to Judge Lacombe:

Henry *v.* Speer, 201 Fed., 869 (C. C. A.);

and Judge Lacombe would not have been authorized to designate another Judge, under this Section, unless, in his opinion, facts were stated in the affidavit showing bias or prejudice, nor unless there was a proper certificate by counsel, nor unless the application was made within the time prescribed by the Statute. The very employment of the term "application", in this Section, indicates that the act is not

an arbitrary one on the part of a complaining party but is an "application" addressed to the discretion of the Senior Circuit Judge; and the Return of Judge Lacombe shows that he examined the papers and appointed Judge Mayer in the exercise of judicial discretion (fols. 139–140).

It is suggested in the petition, that the order of Judge Lacombe was a nullity, because not made within ten days before the beginning of the term (fol. 35). It is doubtful, however, whether that provision would apply to a proceeding in bankruptcy, which necessarily extends over many terms of the court. If, however, it does apply, an excuse was given in the affidavit for the failure to file it within ten days before the following term; and whether or not that excuse was sufficient was also a question to be determined by Judge Lacombe, in the exercise of judicial discretion, with which this Court will not interfere.

Section 21 necessarily applies to actions and proceedings pending at the time The Judicial Code took effect.

Henry *v.* Speer, 201 Fed., 869 (C. C. A.).

That also was a judicial question, however, that could be reviewed only by an appeal or petition to review.

IV. The validity of Section 21 is mainly attacked on the ground that, in conferring power upon a litigant to disqualify a judge arbitrarily, Congress has usurped judicial power.

No arbitrary power is conferred upon the litigant by this statute. He merely has the right to state the facts from which it may be inferred by the Senior Circuit Judge that he cannot obtain an impartial hearing of his case before the Judge appointed to hold the Court. If he makes that fact to appear to the satisfaction of the Circuit Judge, he ought, as a matter of justice, to be permitted to have his case heard by an impartial judge. This

has been recognized from time immemorial, in disqualifying judges who are personally interested in the subject matter of the litigation or whose judgment might be affected by the interests of those related to them by blood or affinity. But the particular cause of the improper influence over the judicial mind is of no consequence. If it in fact exists, the litigant should not be required to submit to it. There is no substantial distinction between the right given to disqualify a judge, where it is limited, as in Section 21, to a single disqualification, and the right conferred upon litigants to challenge jurors for interest, or even peremptorily.

V. Even if Section 21 expressly conferred the arbitrary power upon a litigant to disqualify a judge upon the mere statement, under oath, of the existence of bias or prejudice, without setting forth the facts claimed to show the same, it would not be unconstitutional.

The petitioners state in their petition (fols. 32-3) that Section 21 has been declared unconstitutional and void by the Circuit Court for the Fifth Circuit. Reference is probably intended to the opinion of District Judge Jones, in *Ex parte* N. K. Fairbank Co. (194 Fed., 978). Judge Jones was the judge against whom a charge had been made in that case, and the matter never came before the Senior Judge of the Circuit Court.

VI. Provisions similar to those contained in Section 21 of The Judicial Code exist in a number of the States:

Arkansas: Kirby's Digest (1904), Secs. 4571-4, 2515-9 (Justices of the Peace);
California: Code Civil Proc., Sec. 170;
Florida: Rev. St. (1906), Sec. 1471;
Illinois: Rev. St. (1912), Chap. 146, Secs. 1, 3, 8, 18, 20;
Indiana: Code Civ. Pro., Secs. 255, 257; Code Crim. Pro., Secs. 194, 195;

Kentucky: Ky. Stat. (1909), Sec. 2824;
Louisiana: Code of Prac., Art. 337-342;
Minnesota: Rev. L. 1905, Sec. 4101;
Missouri: Rev. Stat. (1899), Sec. 1760 (Probate Courts);
Montana: Code Civ. Proc., Sec. 180;
North Dakota: Code Criminal Pro., Sec. 292; Justices' Code, Sec. 124;
Ohio: Rev. Stat., Sec. 55;
Oklahoma: Compiled Laws (1909), Sec. 6766;
Oregon: Lord's Oregon Laws, Sec. 45;
South Dakota: Code Criminal Pro., Sec. 292; Justices' Code, Sec. 124;
Utah: Compiled Laws, Secs. 3669, 5132 (Justices' Courts);
Texas: Rev. Civ. Stat. (1911), Art. 2313 (Justices' Court);
Washington: Act March 18, 1911 (Sess. Laws, p. 617), Secs. 1 and 2;
Wisconsin: Rev. Stat., Sec. 2625 (Civil), 4680, 4686*a* (Criminal).

Under some of these statutes, it has been held that the litigant can disqualify the judge arbitrarily, by alleging prejudice, without stating the facts claimed to constitute it. But no decision has been found, under any of them, holding the statutory provisions to be unconstitutional, although the questions arising under them of the exercise of this power have frequently been before the courts.

German Ins. Co. *v.* Landram, 88 Ky., 433;
Vance *v.* Field, 89 Ky., 178;
State *v.* Gray, 100 Mo. App., 98;
State *v.* Montgomery, 160 Mo. App., 724;
State *v.* Clifford, 65 Wash., 313;
State *v.* Palmer, 4 So. Dak., 543;
State *v.* Gardner, 88 Minn., 130;
State *v.* Hoist, 111 Minn., 325;

Lincoln *v.* Territory, 8 Okla., 546;
State *v.* Clancy, 30 Mont., 529, 539;
Knickerbocker Ins. Co. *v.* Tolman, 80 Ill., 106;
McGoon *v.* Little, 7 Ill., 42;
State *ex rel.* Tyrell *v.* Judge, 33 La. Ann., 1293;
State *v.* Kent, 4 No. Dak., 577;
Manly *v.* State, 52 Ind., 215;
Krutz *v.* Griffith, 68 Ind., 444;
Bachmann *v.* City of Milwaukee, 47 Wis., 435;
Rinis *v.* Boyd, 7 Wis., 134;
Cox *v.* U. S., 100 Fed., 293 (C. C. A., 8th Cir., construing Oklahoma Statute);
State *v.* Shaw, 43 Ohio St., 324;
State *v.* Dirlam, 28 Ohio C. C. R., 69;
Conn *v.* Chadwick & Co., 17 Fla., 428;
Purvis *v.* Frink, 55 Fla., 715;
People *v.* Compton, 123 Cal., 403;
Bassford *v.* Earle, 162 Cal., 115.

VII. By Section 8 of Article I of the Constitution, and by Section 1 of Article III, practically unlimited power is conferred upon Congress to establish and abolish inferior courts and to determine their jurisdiction.

Martin *v.* Hunter's Lessee, 1 Wheat., 304, 331;
United States *v.* Union Pac. R. Co., 98 U. S., 569.

In United States *v.* Union Pac. R. Co., Mr. Justice Miller said (p. 603):

> "We say, therefore, that with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution."

Where a subject is not expressly covered by constitutional provisions, the legislature can prescribe the jurisdiction of the courts and pass laws governing their procedure.

Wayman *v.* Southard, 10 Wheat., 1, 29;
Livingston *v.* Story, 9 Pet., 632, 656;
United States *v.* Union Pac. R. Co., *supra*;

Thus, Congress may provide for the transfer of cases from one court to another.

Stuart *v.* Laird, 1 Cranch, 299;
United States *v.* Murphy, 3 Wall., 649.

No constitutional rights of litigants are affected by changing the jurisdiction of courts or transferring pending cases.

United States *v.* Union Pac. R. Co., *supra*.

If no constitutional right is impaired by a statute permitting cases to be transferred from one court to another, it is difficult to see why there should be any impairment when a case is transferred from one judge to another, in the same Court. Under what circumstances a Federal judge of an inferior court should be disqualified on the ground of bias or prejudice is necessarily within the power of Congress, which creates the courts and regulates their practice and procedure; and it is no usurpation of judicial power for the legislature to provide that the affidavits of disqualification shall be conclusive as to the facts therein stated; because such a provision is clearly a rule of evidence.

Ky. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed., 567, 614;
James *v.* Appel, 192 U. S., 129, 136.

As the Supreme Court of Montana said in State *v.* Clancy (30 Mont., 529, 539):

> "It is hardly necessary to say that a party is not deprived of life, liberty or property by

the mere fact that he cannot have his case tried before a particular judge."

It might as well be said that the provision in the the new Equity Rules (Rule 22), permitting a case commenced on the equity side of the Court to be transferred to the law side, is a violation of the rights of the parties.

EIGHTH.

The so-called Traverse.

I. Much of the matter in this so-called Traverse is merely argumentative, and much of it is the assertion of new matter. Both are improper.

II. It would be inconsistent with the dignity due to the courts and their judges, to compel judicial action where a litigant attempts to question the accuracy of the statements contained in the Return of a judge; and it has, consequently, been recognized that such returns are conclusive and cannot be controverted.

People *v.* Judge, Wayne Circuit Court, 23 Mich., 536;
Douglas *v.* Loomis, 5 W. Va., 542;
Cumings *v.* Armstrong, 34 W. Va., 1.

If this Court were at liberty to consider that issues of fact had been raised by this Traverse, that alone would necessarily lead it to deny the application for a writ of mandamus; for it would create a doubt and where there is a doubt, the writ will not issue. The right to it must be clear and the failure of a Judge to perform his duty must be flagrant before the Court will hold him guilty of a breach of duty.

III. Judge Mayer, in his Return, made the statement that the petitioner, Elizabeth C. Seaman, "as the former President and Treasurer of the Iron

Clad Manufacturing Company, and sole owner of its capital stock, and as President and Treasurer of the American Steel Barrel Company, *and former holder of all of its capital stock*", is alone opposing the application to have the assets of the American Steel Barrel Company declared to belong to the Iron Clad Company; that George A. Wheelock had, in December, 1911, filed an affidavit claiming to be the owner of the capital stock of the Barrel Company, but that Wheelock had never personally appeared in Court, and that in April, 1912, his attorney, who had previously entered an appearance for him, applied to the Court for leave to withdraw the appearance and stated that Mrs. Seaman had requested him to make such application; which was refused (fols. 180–2).

In Exhibit A, forming part of the original petition herein, it is averred that on May 24, 1911 (the petition in bankruptcy against the Iron Clad Company was filed on May 23, 1911; petition, fol. 13), *all* of the capital stock of the Barrel Company, except the qualifying shares of directors, stood in the name of Mrs. Seaman, and that she was then President *and Treasurer* of the Company (fols. 57–8). In the same Exhibit, the statement is made, that the said George A. Wheelock claimed to have purchased the capital stock of the Barrel Company at or shortly prior to the filing of the petition in bankruptcy.

The original petition herein was verified by Mrs. Seaman, as President of the Barrel Company (fol. 48).

In the Traverse now served (also verified by Mrs. Seaman, as President), an attempt is made to discredit the accuracy of Judge Mayer's Return, in its statement as to Mrs. Seaman's control of the litigation. This attempt not only totally fails, but it most emphatically confirms the correctness of that Return and makes absolutely clear the bad faith of this petitioner on the present application and throughout the prolonged and costly proceedings in the Bankruptcy

Court. Mrs. Seaman now coolly asserts that for the past two years (since April 14, 1911), she has not owned any of the capital stock of the Barrel Company, except *one* share, and that the owner of all of the stock, except this one share, is George A. Wheelock, who has been in France since April, 1911, which is the reason he has not appeared before Judge Mayer (fols. 49–50); and she does not attempt to controvert the statement that the attorney for this alleged owner of the entire business of the Barrel Company, at her request, asked leave to withdraw the appearance entered on behalf of the alleged owner. It is no wonder that Judge Mayer, in the opinion written by him in April, 1912, stated that this alleged transaction with Wheelock called for some inquiry into the facts (fols. 190–1).

IV. Other indications of Mrs. Seaman's bad faith crop out in this Traverse.

The return of Judge Lacombe showed that the Barrel Company, of which she has been the President and Treasurer, was adjudged to be in contempt, for failure to produce its books, by the order of June 14, 1912 (fol. 143), and that she personally was adjudged to be in contempt for the same reason, by an order made July 3, 1912, and that these orders were reviewed by the Circuit Court of Appeals in December, 1912 (fol. 144), the former order being confirmed, and the latter reversed on the ground that the evidence against Mrs. Seaman as to the books being under her control was not sufficiently convincing (201 Fed. Rep., 66, 69). But now comes Mrs. Seaman into Court, and, in her Traverse, states that the Barrel Company had intended to petition for a remission of the fine imposed upon it, because "*on the night of January 1, 1913, the said books were, by parties unknown to your petitioners, placed in the vestibule of the residence of your petitioner, Elizabeth Cochrane Seaman*, at Number 15 West 37th Street, in the City of New York;" and the books were thereupon delivered to the Bankruptcy Court (Traverse,

plication to open the proceeding and permit testimony to be taken was pending before Judge Chatfield at the time he was disqualified. If he had not been disqualified, it certainly would not have been his duty to enter an order on his previous opinion until he had disposed of that application. If it should be contended that the order made by Judge Mayer on that application is a nullity, then the application itself would still be pending; and, under the joint designation of Judges Chatfield and Veeder of May 22, 1912, Judge Mayer would have the power to formally grant the application and enter a new order to the same effect as his order of April 22, 1912; and the proceedings before the Special Master would then follow, and the parties would undoubtedly stipulate to avail themselves of the evidence heretofore taken. In other words, this Court would not compel Judge Chatfield to proceed, when he and Judge Veeder have duly conferred power upon Judge Mayer to act as Judge in the Eastern District, and when Judge Mayer had acted and is still acting under the power thus conferred upon him.

NINTH.

The application should be denied.

Washington, April 21, 1913.

JOHN A. GARVER,
EDWIN T. RICE,
CHARLES A. RIEGELMAN,
Counsel for Respondents,
Hon. E. Henry Lacombe and Hon. Julius M. Mayer.